EMPLOYMENT TRIBUNALS

Claimant: Mr P Moore

Respondent: Core Market Strategies Limited

Heard at: London Central
On: 17, 18 and 19 May 2021

Before: Employment Judge Heath

Representation
Claimant: Ms Amy Stroud (Counsel)
Respondent: In person

RESERVED JUDGMENT

1. The claimant's claims for constructive unfair dismissal, breach of contract (notice pay), unauthorised deductions from wages and holiday pay are not upheld and are dismissed.

REASONS

Introduction

1. The claimant brings claims for constructive unfair dismissal, breach of contract (in relation to notice pay), unpaid holiday pay and unlawful deduction from wages (in respect of unpaid salary) against the respondent.

Procedure

2. The claimant presented his ET1 on 15 August 2019. The respondent filed its ET3 on 13 November 2019, denying the claimant's claims.

3. On 23 January 2020 a Preliminary Hearing took place before EJ Emery, at which the issues in the case were agreed between the parties and set out in the record of the preliminary hearing (and set out below). Case management orders were made, and the matter was set down for a final hearing with a time

estimate of three days, beginning 14 September 2020. The final hearing did not take place as, I am told by the claimant, the respondent did not produce its witness statements on time and applied for a postponement. I have not seen any paperwork in relation to the postponed hearing on 14 September.

4. The matter came before me listed for a final hearing on 17 May 2021, again listed for three days, to deal with both liability and remedy. There was an 864-page bundle, which had had numerous documents recently inserted into it. The claimant produced a witness statement of 54 pages in length (including seven appendices). For the respondent witness statements were produced by Mr Timothy Gledhill and Mr Timothy Vickers. The claimant, Mr Gledhill and Mr Vickers all gave oral evidence.

5. After clarifying the issues at the start of the hearing I decided to take until at least 3 PM to read into the case. I told the parties that I would email them if there was to be any change to this. In the event it became very clear to me that I was going to need the whole of the first day to read the witness statements and the documents referred to in those statements, and that it was not going to be possible to hear any more than the liability element of the case in the three allotted days. I emailed the parties to this effect, and informed them that the hearing would resume the following morning.

6. On the second day I dealt with an issue with documentation. The claimant wished to add documents which related to matters Mr Gledhill had raised in paragraph 4 of his witness statement concerning other legal proceedings between him and the claimant. I was told that the documentation was written on a without prejudice basis. I took the view that matters raised in paragraph 4 of Mr Gledhill witness statement were not relevant to the issues which I had to decide and that I saw no exception to the rule that without prejudice documentation is generally excluded save in certain exceptions. The claimant relied on a general credibility point as warranting the inclusion of these documents, but this was not within one of the exceptions.

7. The claimant also wanted to include a short email from December 2015 before the respondent company was set up, and which did not seem necessary to determine the issues between the parties.

8. The respondent wished to include an email of the January 2019 relating to compliance issues, and a letter dated 19th every 2019 which related to the calculation of what is known as VaR. Both these documents, on the face of it seemed potentially relevant and I allowed these to be placed in the bundle.

9. The claimant gave evidence and was cross examined for the whole of the second day of the hearing (18 May 2021). He “re-examined himself” in the morning of the third day (19 May 2021). Mr Vickers gave evidence and was cross examined, and then Mr Gledhill then gave evidence and was cross examined. The third day ended after 5 PM, and so I directed that the parties provide written submissions which I suggested be kept to a manageable length. I followed up with a written case management order in respect of written submissions which I suggested be kept to 15 pages in length. The respondent produced written submissions of 19 pages and the claimant of 36 pages (together with an explanation as to why they were so long).

The issues

10. The parties confirmed that the start of the hearing that the issues in the case were as set out in EJ Emery's record of a preliminary hearing. The issues are as follows: –

Constructive unfair dismissal & wrongful dismissal

(i) Was the claimant constructively dismissed?

a) Did the respondent's conduct amount to a breach of the implied term of mutual trust and confidence, i..e did it, without reasonable and proper cause, not give him an ongoing role, divert business and exclude him from decision making? Did it thereby conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?

b) If so, did the claimant "affirm" the contract of employment before resigning? (To "affirm" means to act in a manner that indicates the claimant remains bound by the terms of the contract.)

c) If not, did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation - it need not be the only reason for the resignation)?

(ii) If the claimant was dismissed, they will also have been wrongfully dismissed, if they resigned without notice.

(iii) If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance withsection 98(4) ERA, and in particular, did the respondent in all respects act within the "band of reasonable responses"?

Remedy for unfair dismissal

(i) If the claimant was unfairly dismissed and the remedy is compensation:

a) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed?

b) Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) ERA; and if so to what extent?

c) Did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant tosection 123(6) ERA?

Unpaid annual leave - Working Time Regulations 1998

a) When the claimant's employment came to an end, was he paid all of the compensation he was entitled to under Regulation 14 of the Working Time Regulations 1998?

Unauthorised deductions

Did the respondent make unauthorised deductions from the claimant's wages (section 13 ERA) and if so how much was deducted?

The facts

11. It is inevitable with such a long bundle, lengthy witness statements and submissions, that I will not make findings of fact in relation to each matter the parties have put before me. I indicated at the outset of the hearing that I would only read documents in the bundle if the parties referred to them in their witness statements or drew my attention to them during the hearing. I must point out that when reading the claimant's closing submissions, it was apparent that he referred to documents which had not been brought to my attention during the hearing. I did briefly look at these documents, checked whether they had seen brought to my attention during the hearing, but will not rely on them in making my decision. Similarly, the length of the claimant's closing submissions seems in part due to the fact that he was using the submissions as an opportunity to expand on his evidence rather than make submissions about the evidence I heard and read during the hearing. I raise this not to criticise the claimant, who is after all a litigant in person, but I make clear that I will only be making findings on matters raised in evidence during the hearing.

<u>Background</u>

12. Both the claimant and Mr Tim Gledhill have had a long careers in financial services. In 2001 the claimant first met Mr Gledhill when they worked together at Merrill Lynch. The two men kept in touch after Mr Gledhill left Merrill Lynch to set up an investment company called Solent Capital. He then worked for a company called Heronden, becoming its CEO.

13. Mr Gledhill is an entrepreneurial investor. He pursued a number of business interests, often simultaneously. As he said in evidence "*you throw out ideas continually and get a hook*". He was continually seeking to develop investment opportunities from 2013 onwards and quite probably before that.

14. In 2013 the claimant and Mr Gledhill worked together to establish a credit fund at the investment firm Hermes. The claimant had left employment to pursue this venture on a 50-50 profit share arrangement with Mr Gledhill, and was working out of Heronden's offices. This opportunity did not come to fruition when Hermes chose to pursue other strategies.

15. Whilst this episode is very much by way of background, it does illustrate some features which were to emerge from the evidence. The first is that the individuals involved in this case pursued business endeavours outside the context of straightforward employment. Second, investment ideas and strategies are developed with no guarantee of success. As Mr Gledhill put it in evidence, there can be "*a low hit rate*".

16. Mr Tim Vickers was hired by Mr Gledhill in 2005 to work for Solent as an asset manager on leaving university. He did this for a number of years until he went on to work with Mr Gledhill at Heronden, where he became Head of Trading.

17. In 2015 Mr Gledhill, as CEO of Herondon, engaged the claimant on a consultancy basis to develop investment ideas. These ideas were based around managing a fund that employed a systematic trading strategy in a fund. Given Heronden's regulatory status, a new company would need to be found or created to take this project forward. The claimant was paid £70,192 for his consultancy work between June 2015 and February 2016.

18. From September 2015 onwards there were discussions between Heronden and an asset management firm called GAM to develop these ideas into a business proposition. A number of options were discussed about possible deals involving sale, merger or joint-venture. In November 2015 a memorandum of agreement ("MoU") was drawn up which envisaged the claimant, Mr Gledhill and Mr Vickers agreeing to work together at GAM if an agreement was reached between it and Heronden. Agreeing the economic interests in this MoU was a difficult and drawn-out process.

19. This business proposal did not come to fruition, as GAM decided to pursue a similar project with another firm called Cantab, which it acquired.

20. In these reasons when I refer to "the three men" I am referring to the claimant, Mr Gledhill and Mr Vickers.

<u>Setting up the respondent company</u>

21. From January to April 2016 the three men continued to work on developing their investment ideas, working from home and from rented offices. The claimant was paid £19,000 for this work during this period, funded by Heronden and later reimbursed by the respondent.

22. In March 2016 a contact of Mr Gledhill's, Mr Laredo, agreed to invest in the venture. In April 2016 the three men had a meeting at which a proposal was put forward for shareholding in a company that was to be set up. This, and other matters, were incorporated into an MoU between the three men and Mr Laredo [B38]. The terms of the MoU included an agreement to establish a new company as a fund management company, for Mr Laredo to purchase £1 million of zero-coupon preference shares in the company to fund its set up, and for the shareholding to be split as follows: Mr Laredo 33%, Mr Gledhill 33%, Mr Vickers 21% and the claimant 13% +10% of gross management fees attributable to internally raised assets (as defined within the MoU). The MoU also documented that the three men would agree to enter into employment contracts with the new company, and it set out roles for the three men.

23. On 15 April 2016 the respondent was incorporated as a limited company with three men as the three directors of the company. Mr Gledhill held 53% of the voting shares in the company, with the claimant holding 21%. The company was set up to operate as an investment adviser, with the objective of advising a fund, which would be set up and administered, and investors would be sourced for it. The company was appointed representative of Sturgeon Ventures LLP which was authorised and regulated by the Financial Conduct Authority. The company rented offices in Piccadilly and began the process of

establishing an Irish UCITS fund with the appropriate regulatory structure in place.

24. A Management Responsibilities Map was agreed, setting out the responsibilities of the three men [B 43]. Mr Gledhill was the CEO, Head of Risk and Operations, Designated Co-Portfolio Manager. Mr Vickers was Director, Head of Trading, Designated Co-Portfolio Manager. The claimant was Director, Head of Distribution, Head of UCITS Compliance. A job description [B44] set out the claimant's role as "*Head of distribution and structuring, which involves overseeing both internal distribution as well as distribution agreements with third parties. Patrick is also Core Market Strategies compliance officer*."

25. Mr Vickers was responsible for the structuring of the fund and implementing its trading systems. I will not attempt to describe how the fund operated beyond saying that it was a single trade fund which varied its position according to 2 rules - to protect losses if the market fell and to increase position if market recovered after a fall. There were a lot of what Mr Vickers described as "moving parts underneath" and the operation of the fund was based on statistics bordering on machine learning.

26. Mr Gledhill substantially assisted Mr Vickers as can be seen from Bloomberg messaging between them. While I do accept that Mr Gledhill was pursuing ventures other than Core Market Strategies, I find that he was substantially committed to the respondent's endeavour and devoted a considerable amount of time and energy to it. I accept that Mr Vickers may well on occasion have expressed frustration that he could have done with more help from Mr Gledhill, but this sort of complaint is a common one in workplaces everywhere.

27. Despite what had been agreed in the MoU, no contracts of employment were ever drafted.

28. The three men's salary was £100,000 per annum each from June 2016 onwards, with the first payment representing accrued salaries from April 2016.

<u>Operating the respondent company</u>

29. The claimant worked on marketing of the fund from spring 2016 onwards. He pursued his own personal contacts in seeking to source investors and had conversations with a number of them. Additionally he introduced Mr Gledhill or Mr Vickers (sometimes both) to potential investors.

30. One investment opportunity which was pursued was with a firm called Catalina. Mr Gledhill had been a member of the Catalina investment committee for around four years, which required one to two days work per month. He had known its Chief Investment Officer (CIO), Mr Harnik, for around 20 years having worked with him previously. Mr Harnik was described by Mr Gledhill as a very smart man but not a "people person" who could be very direct and difficult to work with. The claimant provided some helpful information to Mr Gledhill about EU insurance regulations, known as Solvency II, but I find that Catalina was introduced to the respondent as a potential investor in the summer of 2016 almost entirely because of Mr Gledhill's personal relationship with Mr Harnik.

31. In the summer and the latter part of 2016, it became clear that raising investment might not be particularly easy. Face-to-face, potential investors often sound positive, but will subsequently decline to convert that positivity into investment. An analogy was given by Mr Gledhill that seeking investment from potential investors was like being a peasant picking up the crumbs dropped by the wealthy and powerful. It appears that there is a vast disparity in bargaining power in these relationships. For a variety of reasons, promising leads failed to materialise. One of the many reasons was that some investors would want to see a track record. In the respondent's case, at this stage the fund had not yet been launched and no track record established. To an extent this problem could be mitigated by pointing out that the respondents fund was a rules-based fund and so a hypothetical performance of the fund could be demonstrated to the potential investor.

32. The claimant broadened his approach to potential overseas investors, such as the Bank of Singapore, whose CIO he knew. He also pursued a number of leads in Scandinavia, Switzerland and Pakistan.

33. In August 2016 the claimant remortgaged his home. The relevance of this is that he was asked by his mortgage provider to produce proof of income and a contract of employment or a shareholder agreement. At this stage the claimant had not been provided with their contract of employment. In fact no contracts of employment were ever drafted for the three men.

34. In February 2017 the claimant and Mr Vickers went on a two-day trip to Denmark and Sweden to see potential investigators the claimant had been cultivating. In March 2017 the claimant and Mr Vickers had meetings with potential investors in Switzerland. Generally, investors seemed positive face-to-face but none of them ever confirmed that they could be seed investors. There was one meeting which lasted for over two hours with a firm called LGT. The contact at that firm was very focused on discussing the mechanics of the strategy with Mr Vickers. In hindsight Mr Vickers believes that, as this firm had a similar strategy to the respondent's fund in house, that the level of interest shown was fishing for information rather than a genuine interest in investing.

35. On 31 March 2017 the claimant emailed Mr Vickers setting out his recollection of what had been discussed in some of these meetings, and asked Mr Vickers to confirm that recollection [B100]. On 10 April 2017 he sent a follow-up email asking again for Mr Vickers to confirm his recollection. This was put forward by the claimant as an example of his continually asking for information and it not being provided, thus making his job more difficult and causing delay which antagonised potential investors. However, Mr Vickers pointed out that after 31 March 2017 he and the claimant had gone to Singapore and that after the follow-up email of 10 April 2017 he supplied information asked for. In cross-examination of the claimant Ms Stroud took the claimant to a number of examples ([B180], [B182], [B183]) where the claimant had asked for information and it was supplied promptly. I do not find that the claimant was hampered in his marketing attempts by Mr Gledhill or Mr Vickers failing to provide information for him.

36. Attempts were made to draft a shareholder agreement, and a draft was provided in or around 4 April 2017 [B102]. The claimant was very unhappy with the contents of this draft. He pointed out that the lawyer he had engaged

had given feedback on a previous draft the previous December and that comments had not been taken on board. He pointed out "*we have spent a year on this document and it has not really progressed in that time. I do not understand why it is proved so difficult to move this forward. If we are not going to be able to reflect the terms of the MOU we agreed (after a great deal of discussion) in a proper agreement then we should just acknowledge that now and move on*".

37. The trip to Singapore was not a success. The claimant's contact did not have the discretion to invest as was hoped. The Bank fielded a junior manager to speak to the claimant and Mr Vickers, and they did not get past this gatekeeper.

38. In April 2017 the claimant made the point to Mr Gledhill that it was difficult having a serious conversation with investors with the fund not having been set up, a point that was accepted by Mr Gledhill [B103].

39. In the summer of 2017, the claimant explored pursuing a personal business venture with NAB and Cheyne Capital, which he told Mr Gledhill and Sturgeon ventures about.

40. Also in the summer of 2017 it was discovered that there was an error in the model of the fund, which took some time to be "repaired".

41. In June 2017 Mr Harnik and Mr Gledhill were in communication about the possibility of Catalina investing in the respondent's fund [B103-8].

42. By the summer of 2017 the respondent still had no investors, meaning no assets under management and therefore no revenue. It had spent most of Mr Laredo's £1 million investment. The dire financial position was self-evident. On 10 July 2017 the claimant and Mr Vickers corresponded by email about the shareholder agreement which still had not been finalised, and some tension is evident [B120-122].

43. On 24 August 2017 Mr Gledhill emailed Mr Laredo, cc Mr Vickers and the claimant, with a proposal, given the financial position [B109]. The proposal was: –

    "*1. We go to half salary from 1st Sep until AuM is $50m, clawback of deficit when AuM hits $100m*

    2. Current loan is £890k, you fund to 31st Dec based on above

    3. Subject to Articles & Shareholder Agreement being signed. Would be good to have done by Fri Sept 1st."

44. A meeting took place between the three men and Mr Laredo towards the end of August 2017 to discuss this proposal, which was agreed. After the meeting the three men returned to the respondent's office and an argument took place between Mr Vickers and the claimant. Mr Vickers said, words to the effect, that if the claimant had done his job properly and got some investors the respondent would not be in this position. The claimant expressed that he could have done with more help and asked when the shareholder agreement was going to be finalised. Mr Vickers was angered by the claimant's focus on the shareholder agreement when it appeared clear to him that the respondent

was facing serious financial difficulty, their salaries had just been halved and his own personal circumstances were that his first baby had recently been born. Mr Vickers, in colourful language, explained that he did not care about the shareholder agreement and suggested that the claimant should resign and join another asset management firm. Mr Vickers then left the offices and from then on largely worked from home.

45. On 1 September 2017 the shareholder agreement [B141 – 172] was signed and articles of association for the respondent company reduced. Again, no written contract of employment was produced for any of the three men. Just prior to signing the shareholder agreement the claimant messaged Mr Gledhill as follows: – "*There is a load of other stuff that needs to be done on completion - such as subscribe for shares, appoint JL as chairman, service agreements for the three of us, update register of members. This is not going to get done today. I suggest we sign today and sort all this stuff out next week without doing it in a stupid rush. The point of signing today is to agree that we are on half salary and locked in to Xmas rather than have us all peel off and do our own thing*" [B174]..

46. At some point in September 2017 the claimant had a conversation with Mr Gledhill about Catalina, which had not yet invested. The claimant told Mr Gledhill that he needed to tell Mr Harnik to "get it done". Mr Gledhill was annoyed at what appeared to him an unhelpful suggestion with how to deal with a large potential investor. In a message exchange with Mr Vickers Mr Gledhill referred to the claimant's comment, and expressed the view that this was "*'kin helpful*". Mr Vickers found this amusing and responded that Mr Gledhill should tell the claimant to phone Johan (the claimant's contact at the Bank of Singapore, who turned out not to have the authority to invest that was hoped for) and "*tell him to get it done*". Mr Vickers then said "*What a cock*" [B223A1].

47. A feature of this case was that extensive transcripts of various forms of instant messaging were placed in the bundle. I am mindful that instant messaging is a very rapid and fluid form of communication that, in a workplace context, can contain some "watercooler conversation". It is easy to focus on a word or phrase out of context and use it to bolster a narrative. Something that is intended as a joke or a flippant remark made in casual conversation can assume the significance it does not merit when subjected to forensic focus. The claimant sought to assert that the comment "What a cock", together with a couple of other similar remarks in instant messaging, reflected serious antagonism towards him largely from Mr Vickers but with the connivance of Mr Gledhill. I find that there had been a change in the relationship between Mr Vickers and the claimant following the tense meeting towards the end of August 2017 referred to above. I find that, from Mr Vickers' perspective, this was due to his view that the claimant had not brought in any investment and had been partly responsible for the financial difficulties the company faced, together with his view that the claimant was disproportionately focused with protecting his own position in the shareholder agreement when the company was in serious difficulty. I find that Mr Gledhill was irritated by being told to tell Mr Harnik to "get it done" and felt the need to share this with Mr Vickers, but that he did not harbour ill-will towards the claimant.

48. On the 19 September 2017 Mr Laredo paid the final £110,000 instalment of his £1 million investment. He did so on the understanding that the proposal

made in the email of 24 August 2017, agreed at a subsequent meeting, was put in place.

49. On 29 September 2017 the fund (known as CMS Tactical Credit) launched. Catalina invested $20 million into the fund. Again, the sole source of revenue to the respondent were fees generated by assets under management ("AuM"). The Catalina investment would generate fees of $80,000 per annum for the respondent which would not even begin to cover its costs. It was therefore essential that more investment was achieved.

50. On 5 October 2017 [B229] Mr Gledhill emailed the claimant to suggest that he should give formal updates on potential investors. He asked for an investor database to create a template to show to Mr Laredo. The claimant responded that a spreadsheet was saved in a file. Mr Gledhill responded that this needed to be expanded to include everyone that has been contacted or who is intended to be contacted. He indicated that Mr Laredo would expect to see the contact details of everyone who has been spoken to. The claimant responded that he did not think this was a good idea and that he had never been asked to do such a thing before. He also pointed out that Mr Gledhill thinks "*we are probably only two months away from [Mr Laredo] pulling the plug*". Mr Gledhill insisted that Mr Laredo would want to see a database of names and that this would be seen as an asset of the company. He pointed out that Mr Laredo's involvement would end in December. The claimant resisted any further attempt to produce such a database.

51. At some point in October 2017 it was clear that Bank of Singapore were not going to invest. Mr Gledhill was surprised to learn that there had never been any commitment to invest, even an informal one, from the portfolio manager at the bank. It turned out that the bank was in fact in the process of setting up its own competitor fund.

52. In December 2017 there were still no further investors in the fund and no realistic prospects. The respondent had exhausted the £1 million funding from Mr Laredo, and despite the reduced salaries, the company's costs were around six times its revenue. The company was teetering on the brink of insolvency. The decision was made to stop renting the Piccadilly office.

53. At some point during 2017 Mr Gledhill explored the possibility of some sort of deal with Fidante and Hermes. Nothing came of this.

54. On 19 January 2018 Mr Gledhill emailed Mr Laredo to say "*No cash left now. Paddy has a couple of meetings next week*." He indicated that the Fidante and Hermes deals would be known about in a couple of weeks. On 23 January 2018 Mr Gledhill again emailed Mr Laredo to say that the direct debits payable in two days' time would bounce unless something is done. He indicated that paying no salaries would reduce costs to £18,000 a month and that closing the fund would cost about £70,000. He suggested the fund should stay open whilst Hermes and Fidante were prospects, and suggested that there were good odds of getting more investors if the fund stayed open for six months. Mr Gledhill indicated that he could provide financial assistance but that the claimant and Mr Vickers would not be able to. Mr Laredo ask what needs to be done over the next three months and said that he could afford it he would provide support and if not he would "pull the plug" [B240].

55. On 26 January 2018 Mr Gledhill emailed the claimant and Mr Vickers saying "*While JL prevaricating we have bills to pay. Suggest we split 40/30/30 TG/PM/TV and fund via directors loans. I'll finance via personal loans (1yr) to each if needed. Without the office +salaries we have about £18k per month to cover. Immediate bills are sturgeon (3.6), bberg (11), office for Jan (5) so suggest £30k now, £60k max, Thoughts?*" [B243]. The claimant responded asking whether a five year repayment term would be acceptable. It was not, and neither Mr Vickers nor the claimant could provide a directors loan.

56. Salaries were not paid from this moment onwards. I find that there was no agreement that the salary would be suspended or postponed and that there would be any form of catch-up payment once the company was in a better position. The evidence points towards the claimant having been focused on the shareholder agreement as the mechanism for safeguarding his remuneration [B120-2]. There is no evidence that he pursued his salary in any form from this point. Given that he was being asked to put money into the company, this is unsurprising.

57. Mr Gledhill provided a letter to Sturgeon Ventures guaranteeing that he had assets to ensure that there would not be an insolvent liquidation of the respondent company, and the company was able to continue trading despite its desperate financial situation.

58. The tenancy on the Piccadilly office was not renewed and was vacated at the end of January 2018.

59. From this point onwards (the end of January 2018) there is practically no documentary evidence to suggest the claimant carried out any meaningful work for the respondent. The only documentary evidence is in the form of handwritten lists of companies, contacts and telephone numbers. The claimant, who has produced a witness statement of 54 pages inclusive of its seven appendices, and a 36-page closing submissions, is clearly a very details oriented person who can commit himself to producing extensive documentation. I do not accept his evidence that he did all of his work over the phone. Even telephone calls will inevitably produce follow up emails, aide-memoires or other forms of documentation. Here there was nothing apart from a few lists of names. He also put forward the explanation that his computer was not working for lengthy periods of time. I do not accept that a person doing the work the claimant did could survive at work without a functioning computer. I accept the evidence of Mr Gledhill that the claimant's email account suggests that only a handful of attempts were made to contact potential investors after this date and that the only evidence of marketing activity was the sending of the generic monthly newsletter to a distribution list. I accept Mr Gledhill's evidence that in this period the claimant did not get any meetings whatsoever with investors. I accept Mr Gledhill's oral evidence that he felt uncomfortable chasing the claimant about work given that he was not being paid anything. Mr Vickers told me that he assumed that the claimant was working elsewhere as it was very difficult to get hold of the claimant, and that he was not even pretending to do any marketing. On the basis of the evidence in his witness statement about introducing NAB to Cheyne in 2017 I find that it was more likely than not that the claimant was in fact exploring business opportunities elsewhere.

60. From January 2018 onwards I find that the claimant was not doing any meaningful work for the respondent. This may have been for the understandable reason that he was not getting any pay. There may also be some truth in the suggestion that at this point the fund was not an easy marketing proposition. Nonetheless, from January 2018 onwards the following was the case: – 1) the claimant had no written contract of employment, 2) the claimant was not being paid, 3) the claimant was hardly doing any work for the respondent, 4) the three men were in a legal relationship governed by the shareholder agreement.

61. I make clear that I am not making any findings about whether or not there was an employment relationship. This case has been run on the basis that there was, and I do not seek to go behind that. What I do find, however, is that the respondent company existed as a condition of operating the fund, and that the relationship of employment was not the primary way in which these three experienced businessman saw their business arrangements as being governed. The focus for the claimant was the shareholder agreement.

62. I also find that this was not an employment relationship of the kind that this tribunal normally encounters. The only three employees of the company were directors, and all were seasoned businessmen. There was no inequality of bargaining power and nothing (to use an old-fashioned concept) of the "master and servant" about their relationship. Additionally, as stated above, the claimant and Mr Gledhill had previously pursued business opportunities by way of consultancy arrangements and profit share ventures.

Catalina and Prosperise

63. Before the setup of the respondent company the three men had sought to develop business proposals with GAM, and had considered various different options, such as merger or joint venture. After the setup of the company, more especially when its financial difficulties became acute, certain steps were taken to explore how to safeguard the business. In this regard I accept the evidence of Mr Gledhill and Mr Vickers that the value of the respondent company is in its product, namely the fund, rather than its marketing function. This is perhaps all the more the case as the company had only succeeded in attracting one investor (Catalina), and that, in most part, due to Mr Gledhill's contacts.

64. As set out above, negotiations to agree an MoU in respect of any deal with GAM and to agree a shareholder agreement had been protracted and difficult and that the claimant, with the assistance of a lawyer, had been very focused on protecting his financial position. The email correspondence between Mr Vickers and the claimant on 10 July 2017 [B120-122] lends support to Mr Gledhill's oral evidence that the claimant had "argued vociferously" for his position and that they had "wasted a lot of time organising an MoU" and produced endless draft agreements.

65. As CEO of the respondent Mr Gledhill felt obligated to pursue any reasonable opportunity to safeguard the business' survival. Survival might be in the form of selling the company, merging it with another or otherwise forming a joint venture. If that were to be done then Mr Gledhill the CEO and Mr Vickers, the product designer who ran the fund, and who were the Co-Portfolio Managers, were undoubtedly going to be part of any future business endeavour.

Marketing was not a unique selling point of the respondent business, and could even be perceived as a negative factor, given the failure to raise any investment beyond the $20 from Catalina.

66. Mr Gledhill contacted around 20 possible candidates to explore possible rescue strategies. The respondent, in exploring any possible proposals, would inevitably be in the position of significant weakness and unable to dictate terms. Additionally, Mr Gledhill and Mr Vickers would need to be able to explain what products and services could be offered to any possible candidate who showed interest. It was also highly desirable that the respondent should be able to pursue any deal speedily. Mr Gledhill was mindful of the significant difficulty encountered in negotiating agreements with the claimant in respect of GAM and the shareholder agreement and perceived that this could get in the way of sourcing a future deal. It is also the case that the "hit rate" for any potential deal would be very low, and that a lot of ideas would need to be put out to people, some time spent discussing them and that most approaches would lead nowhere.

67. Mr Gledhill was candid in his evidence at the tribunal that he consciously excluded the claimant when he investigated possible candidates for future business proposals. He believed that the claimant would, understandably, be focused on preserving his own position in any negotiation to the detriment of any deal that might safeguard the future of the company. He also did so in the understanding that if a final decision had to be made on any substantial change to the respondent business, be that a sale, merger or joint venture, then the claimant would need to be involved as a shareholder. As I have found above, it was also the case that the claimant had largely ceased to play any active role in the company from January 2018 onwards.

68. 24 July 2018 Mr Gledhill messaged a Mr Pucci, the founder, CEO and CIO of Prosperise Capital, who he had known for 13 years and had worked with previously [B438]. Mr Gledhill followed this up with an email [B581] on the same day, in which he set out the bare bones of how the fund operated. Mr Pucci showed some interest and the two men agreed to meet on the 24 July 2018 for lunch. They met again on 22 August 2018 and shared ideas on how a joint venture between CMS and Prosperise might work, which Mr Gledhill subsequently set out in an email of 24 August 2018 [B576]. It would have been clear to Mr Pucci that the respondent's fund only had one investor and would not have been in a good financial shape, so Mr Pucci would have had a dominant position in any negotiation. In short, the idea that was explored would involve the respondent's fund being moved to a Prosperise sub-fund with Mr Gledhill and Mr Vickers taking portfolio manager roles and there being no role for the claimant. I accept Mr Gledhill's evidence that an arrangement of this nature was the only one that Mr Pucci would countenance. Mr Gledhill made Mr Vickers aware of his approach to Mr Pucci but did not tell the claimant.

69. On 31 August 2018 Mr Gledhill was involved in email discussions with Mr Harnik about assisting with internal approvals for Catalina to invest more than $20 million [B527]. Mr Gledhill discussed this with Mr Vickers by messaging, again not involving the claimant, to work out how this proposal might work. He suggested a separate fund which would keep the existing fund intact and marketable.

70. Mr Gledhill met Mr Pucci again on 5 September 2018 and followed up discussions by email. On 13 September 2018 [B572] Mr Gledhill mentioned the discussions with Catalina about a possible sub-fund. Mr Gledhill also kept Mr Harnik abreast of the fact that he was talking to another fund manager (i.e. Mr Pucci) about the possibility of "*merging which will solve our perceived operational weakness, the 'firm AuM' hurdle that many investors have and get the marketing effort back on track*" [B562]. On 26 September 2018 Mr Pucci messaged Mr Gledhill to say that there was no news on how things might be progressing [B438].

71. On 1 October 2018 Mr Pucci again messaged Mr Gledhill to indicate that there might be scope for further discussion [B439]. They arranged to meet that day, but Mr Pucci had to cancel.

72. On 1 October 2018 Mr Gledhill and Mr Vickers discussed the possibilities with Prosperise on Bloomberg messaging. At one point Mr Vickers said "*Can build track record for six months and then try and get Genia*" [B343]. This refers to a Ms Diamond who was a partner at Cantab, the company which had been acquired by GAM in 2016. The claimant's case is that the only way of understanding this is that Mr Vickers and Mr Gledhill were discussing getting Ms Diamond as a direct replacement for him as a marketer. He put this forward in the context of later messaging discussion about a Ms Daw, which I will deal with later. I find that there is very little likelihood that Mr Gledhill and Mr Vickers, with the respondent in its deperate financial situation, could have been seriously discussing securing the services of the Head of Distribution of £4 billion systematic fund as a marketer.

73. Mr Gledhill and Mr Pucci were due to meet on 17 October 2018 but Mr Pucci again cancelled. On that day Mr Gledhill shared with Mr Vickers a proposed outline for a further meeting with Mr Pucci [B593] which included reference to moving the CMS Tactical fund to a Prosperise sub-fund and to Prosperise taking on Mr Gledhill and Mr Vickers. This outline was sent to Mr Pucci the following day [B595].

74. On 24 October 2018 Mr Vickers emailed Mr Gledhill a draft timeline of how any deal with Prosperise would take shape [B598]. This timeline envisaged an MoU being drafted and agreed, lawyers instructed, changes to the investment manager, and Mr Gledhill and Mr Vickers joining Prosperise on 1 December 2018. In the longer term this would lead to the shutting down of the CMS fund.

75. On 25 October 2018 Mr Gledhill emailed Mr Vickers a draft of a proposed email to Mr Pucci ['s B602]. The proposed draft email was to attach a first draft of a high-level task list of things to be done to put any deal in place. The proposed email referred to the need to "*agree economics*" and listed things that Mr Vickers and Mr Gledhill would need to know "*before we can get a broad idea of the potential*".

76. Later on 25 October 2018 Mr Pucci emailed Mr Gledhill say that Prosperise would have to "*put on hold our project from the time being. This is of course disappointing to us. As we both know, this is part of our business so I take it for what it is, a potential deal to continue to work on*". There was no more communication with Mr Pucci in 2018 and it is clear from Mr Vickers' and Mr Gledhill's messages [B363] that they were assuming that this deal was now dead.

77. On 2 November 2018 Mr Gledhill emailed Mr Harnik a draft term sheet relating to the proposed Catalina sub-fund [B614]. Mr Harnik responded on 6 November 2018 "*The most obvious question in my mind is why a separate subfund needs to be set up? It presumably accommodates some degree of liquidity in both directions. If it's a fee issue, that's just a matter of scaling them*". Mr Gledhill responded "*if we change the existing prospectus to accommodate "active mode" it will exclude any new investors… Which we still have some hope for!*" Mr Harnik responded "W*e think that is a subject for debate*". Just to make clear, Mr Harnik was proposing, for the first time, a strategy that would make it impossible to market the fund to third parties. Mr Gledhill was resisting this proposal and suggesting that there was still hope for investment. Mr Harnik did not think that was realistic. What Mr Harnik was proposing would mean, realistically, that there would be no marketing role needed within the respondent.

78. On 14 November 2018 at 10 AM there was a board meeting for the fund [B628] which the claimant and Mr Gledhill attended by telephone. At this point Mr Gledhill had not told the claimant anything about Catalina's proposed change in strategy. During the meeting the change of strategy was raised by Mr Gledhill. At 10:56 AM, during the meeting, the claimant emailed Mr Gledhill "*What are the new strategies you are considering for Catalina?*" [B625]. Claimant also messaged Mr Gledhill just over half an hour later proposing meeting the following day. Mr Gledhill told him he could meet up after a Christmas lunch, but they agreed to postpone a meeting until the following week [B207].

79. Mr Gledhill and Mr Vickers discussed the board meeting over instant messaging on 14 November 2018. The following exchange took place:-

> "*11/14/2018 12:54:36 TGLEDHILL2 Seonaid mentioned the 4:30 meet and I had to talk about it...no big deal as I said it was v early days about getting cat stump up more investment*
>
> *11/14/2018 12:54:53 TVICKERS5 Ah ok damn, I take it paddy was on the call?*
>
> *11/14/2018 12:54:57 TGLEDHILL2 But of course paddy wants to know*
>
> *11/14/2018 12:55:20 TGLEDHILL2 I will meet him to say there's no role for him*
>
> *11/14/2018 12:55:34 TVICKERS5 ok*
>
> *11/14/2018 12:55:38 TVICKERS5 Had to happen sometime I guess*
>
> *11/14/2018 12:56:02 TGLEDHILL2 yeah*"

80. It is clear from this exchange that Mr Gledhill and Mr Vickers would have preferred the information about Catalina's change in strategy not to have come out like this. Mr Gledhill now felt forced into a position where he had to let the claimant know about the strategy.

81. On 17 November 2018 the claimant again messaged Mr Gledhill saying "*give me a shout when you have a chance*". The two men messaged each other a few times over the course of the next few days trying to arrange a time for a

telephone call. It is right to say, however, that the Catalina merged fund was still was not agreed and it was not even clear whether Catalina would be investing more money. But the claimant certainly had not been kept abreast of the direction of travel.

82. On 23 November 2018 Mr Gledhill and the claimant had a telephone conversation during the course of which Mr Gledhill told the claimant about Catalina's wishes to restructure the fund in a way that would not be marketable. I find that the claimant had been interested to hear what any new strategy might be when he heard of it at the board meeting. He was reasonably persistent in his chasing of Mr Gledhill over the course of the next week or so because he was keen to learn the details. I do not accept the claimant's evidence that the first he was told about the plans for Catalina was 17 January 2019. Any change to Catalina strategy was a matter of great interest to him and I find that he was keen to learn of it at the first opportunity. Also, it was clear from Mr Gledhill and Mr Vickers' messages that Mr Gledhill was prepared to inform the claimant of the strategy which would leave him without a role.

83. From 20 November 2018 to 31st of December 2018 Ms McKenzie and Ms Arrowsmith of Sturgeon ventures emailed the three men setting out a range of compliance issues which had not been addressed by the claimant [B654-7].

84. On 9 January 2019 the following exchange took place between Mr Gledhill and Mr Vickers on Bloomberg messaging:-

> *"01/09/2019 10:18:03 TGLEDHILL2 Would you mind looking at the seoniad mail re FCa permissions please?*
>
> *01/09/2019 10:19:34 TVICKERS5 Yeah will have a go*
>
> *01/09/2019 10:20:30 TGLEDHILL2 cheers*
>
> *01/09/2019 10:23:05 TVICKERS5 Have you spoken to paddy about anything?*
>
> *01/09/2019 10:23:14 TVICKERS5 I'm about to suggest we don't need to passport the fund if we aren't marketing.*
>
> *01/09/2019 10:23:55 TVICKERS5 Nevermind I'll just take him off the mail.*
>
> *01/09/2019 10:24:10 TGLEDHILL2 Haven't spoken to paddy*
>
> *01/09/2019 10:24:23 TGLEDHILL2 We need to decide if we are marketing or not*
>
> *01/09/2019 10:24:45 TVICKERS5 Well we aren't..*
>
> *01/09/2019 10:24:47 TVICKERS5 For now.*
>
> *01/09/2019 10:25:07 TGLEDHILL2 Sure but its a hellof as lot harder to get back in later*
>
> *01/09/2019 10:25:07 TVICKERS5 Won't be able to sell the fund to anyone in its new form.*

01/09/2019 10:25:21 TVICKERS5 Ah right I see.

01/09/2019 10:25:22 TGLEDHILL2 I'm not so sure

01/09/2019 10:25:50 TGLEDHILL2 And if we do another subfund then we are stuffed?

01/09/2019 10:25:59 TVICKERS5 Will ask

01/09/2019 10:27:01 TGLEDHILL2 Have fwded KB mail

01/09/2019 10:29:40 TVICKERS5 Thanks - looks like they can do it for us

01/09/2019 10:29:46 TVICKERS5 Will ask the questions anyway

01/09/2019 10:30:27 TGLEDHILL2 Strugeon might do it for free?

01/09/2019 10:30:48 TVICKERS5 maybe

01/09/2019 10:31:52 TVICKERS5 What are you thinking marketing wise going forward then?

01/09/2019 10:32:44 TGLEDHILL2 RIno perhaps

01/09/2019 10:32:54 TVICKERS5 Oh ok

01/09/2019 10:33:17 TVICKERS5 I only ask because I bumped into natalie daw on Saturday morning at the kiddie park.

01/09/2019 10:33:25 TVICKERS5 Reckon she is keen on leaving gam.

01/09/2019 10:33:53 TGLEDHILL2 We should meet

01/09/2019 10:34:02 TVICKERS5 With natalie?

01/09/2019 10:34:42 TGLEDHILL2 yeah

01/09/2019 10:35:09 TVICKERS5 Ok, can try and set that up.. Just for a chat?

01/09/2019 10:36:41 TGLEDHILL2 yeah

01/09/2019 10:37:46 TVICKERS5 Ok when? I'm having a bit of trouble visualising where this is going though.. It would be a prosperise deal contingent thing? S

01/09/2019 10:38:20 TVICKERS5 Like we do the original plan with him and natalie is marketer for it?

01/09/2019 10:38:31 TVICKERS5 Is that deal still on the table?

01/09/2019 10:39:37 TGLEDHILL2 No...have to discount rino really

01/09/2019 10:39:56 TGLEDHILL2 Was half thinking natalie could help CMS and Steed

01/09/2019 10:41:57 TVICKERS5 Yeah maybe. Ok when are you free to meet her? I'll ask

01/09/2019 10:44:57 TGLEDHILL2 Next week tues or thurs after 2pm?

01/09/2019 10:45:06 TVICKERS5 ok

01/09/2019 10:49:12 TVICKERS5 Thurs 2pm done."

85. The "Natalie" who is being spoken about is Ms Daw, who like Ms Diamond worked for Cantab which had been acquired by GAB. The claimant's case, again, is that this exchange showed that Mr Gledhill and Mr Vickers were interviewing Ms Daw to replace him in his role. Mr Gledhill's evidence was that Ms Daw was head of distribution of a £4 billion fund and "*there was no way on earth that we wanted to hire her*", not least as it was unthinkable that a person of her stature would come to do marketing "*at a failed company*".

86. It is not difficult to see how the claimant when reading a sentence like "*Like we do the original plan with him [*i.e. Mr Pucci*] and natalie is marketer*" would assume that some sort of plan is being hatched to bring Ms Daw in as a marketer for the respondent. However, even within the context of this chat this appears unlikely. The men were planning on meeting Ms Daw "*Just for a chat*". In term of the "*original plan*" it is made clear in this chat that <u>that</u> deal (the Prosperise one) is no longer on the table. There is also the reference to "*half thinking Natalie could help CMS and Steed*" (Steed was another of Mr Gledhill's business ventures) to which Mr Vickers responds "*Yeah maybe*". At most, this appears to be the two men tossing ideas about, perhaps with a dash of wishful thinking about how nice it would be to get someone of Ms Daw's stature involved in a deal which is no longer even on the table. I do not read any of this as plan to interview Ms Daw to replace the claimant as he suggested. I do not accept the claimant's evidence that Mr Gledhill and Mr Vickers subsequently "interviewed" Ms Daw for his job. I find that they would have met her for a more general networking type event.

87. On 16 January 2019 Ms McKenzie emailed Mr Gledhill and Mr Vickers, making a conscious decision not to cc the claimant, setting out in an attached document the compliance issues the claimant had not addressed. Ms McKenzie commented that the claimant becomes defensive and does not reply to her or carry out the compliance work for which he is responsible. [B752-3].

88. On 17 January 2019 Mr Gledhill met with the claimant in a restaurant or café in Waterloo station. Mr Gledhill spoke further about Catalina's insistence that further investment would be into a managed fund which would not be marketable. The claimant dedicated that he could find a better deal with an investment firm called Newscape. Mr Gledhill was adamant in his evidence to me that during the course of a conversation at this meeting he picked up the claimant's mobile phone and saw what he believed to be voice recording app running on the screen. He said he was absolutely sure of this, and he told Mr Vickers about it, as Mr Vickers later made a reference to the claimant hypothetically recording a telephone conversation with a dictaphone, and Mr Gledhill made a joke about a dictaphone [B724]. The claimant denies that he was recording that conversation. It is not necessary for me to make a finding about whether the claimant <u>was</u> recording the meeting, but I do find that Mr

Gledhill did see some sort of app running on the claimant's phone with a red line on a blue screen, and that he genuinely believed that the claimant was recording the meeting.

89. On 12 February 2019, at Mr Vickers' suggestion, Mr Gledhill emailed Mr Pucci for a catch up [B677]. They met on 12 February 2019, and Mr Gledhill followed this up with an email exchange between 15 February 2019 and 27 February [B672-4]. Essentially, Mr Gledhill was proposing transferring the fund to Prosperise. On 27 February 2019 Mr Pucci indicated that he largely agreed with the proposals. Mr Gledhill and Mr Vickers were also discussing matters by messaging [B690 – 1]. Again the claimant was not told of these discussions.

90. On 5 March 2019 Mr Gledhill emailed Mr Harnik a a term sheet relating to the Catalina proposal for a managed fund [B701A85-6] and [B702].

91. At some point between 27 February and 6 March 2019, Mr Gledhill told the claimant in a telephone conversation about the business proposal and discussions with Mr Pucci. On 6 March 2019 the claimant sent a WhatsApp message asking Mr Gledhill to send him all correspondence between Mr Gledhill, Mr Vickers, Catalina and Prosperise as he "*would like to understand the genesis of discussions with them*" [B703].

92. On 11 March 2019 Mr Gledhill emailed the claimant to ask for an NDA which he understood the claimant to be seeking from the company Newscape which he had said was a potential investor. The claimant responded that he had not seen it yet (this was not correct, he had seen it in December 2018) but "*would rather first understand how the discussions with Catalina and then Prosperise have evolved first. As I said on the phone, I'm left with the worrying feeling that I was deliberately excluded from all these discussions. I would rather go through the complete email correspondence between yourself, Tim Vickers, Catalina and Prosperise*" [B706].

93. Again, on 11 March 2019 Mr Gledhill had an exchange on Bloomberg messaging with Mr Vickers. At this point Mr Gledhill assumed that the claimant was attempting to build some sort of court case, based in part on his belief that the claimant had recorded the telephone conversation at Waterloo. The two men speculated on what kind of claim the claimant might bring under the shareholder agreement and how they might address it [B422].

94. On 18 March 2019 Mr Vickers emailed Mr Pucci a draft MoU relating to the Prosperise deal [B711].

95. Also on 18 March Mr Harnik emailed Mr Gledhill about the term sheet he had been sent, saying "*looks fine from our perspective. We obviously will need to perform KYC on Prosperise so some background info would be very helpful*" [B716].

96. On 10 April 2019 Mr Gledhill spoke with the claimant on the telephone and on 12 April 2019 Gledhill emailed the claimant email correspondence with Prosperise and the draft term sheet [B724]. Mr Gledhill attempted to contact the claimant on 15, 16, 17, 18 and 23 April 2019 with no success.

97. On 25 April 2019 the MoU with Prosperise was finalised subject to internal board meeting approval on behalf of the respondent [B724A100-106].

98. On 26 April 2019 the claimant emailed Mr Vickers and Mr Gledhill his resignation as director of the respondent company with immediate effect [B725 – 7]. He set out that it was clear to him that Mr Gledhill and Mr Vickers sought to exclude him from any discussions or decision-making process regarding the respondent company and kept in the dark about the Catalina proposal or the transfer of assets to Prosperise. He observed that Mr Gledhill and Mr Vickers sought to extract the value out of the respondent, safeguarded their own financial interests at the expense of his. He stated: -

> "*Your joint exclusion of me from the CMS decision-making process is a fundamental breach of trust and confidence, as well as constituting a material and repudiatory breach of my contract of employment with the company. I am engaged as head of distribution and in that capacity, as well as in my capacity as a director of the company, I am entitled to participate in, and be consulted in relation to, decisions regarding the company's products and their marketing. My exclusion from all recent conversations with Catalina and Prosperise, and any discussions at board level relating to the relationship between CMS, Catalina and Prosperise, comprise the clearest demonstration of the repudiation of my employment contract terms by CMS.*
>
> *Please note that I accept such repudiation, and I will treat my employment as having been terminated by CMS with effect from today's date (having been constructively unfairly dismissed by CMS). As you will be aware, I have the right not to be unfairly dismissed. CMS' repudiatory breach constitutes both wrongful termination of my contract and unfair dismissal, and I shall pursue my rights in both respects*".

He also observed: -

> *"Although we mutually agreed last year to suspend our right to receive monthly remuneration from CMS, given the financial condition of the company, we have each remained as employees of the company with an expectation that the payment of remuneration would be resumed once financial circumstances permitted".*

99. The respondent's solicitors replied to the claimant's email on 22nd of May 2019 denying his allegations. In respect of the claimant's alleged exclusion from discussions they observed that when the proposal had been worked up into something substantial it was disclosed the claimant together with surrounding information.

The law

Constructive dismissal

100. Under section 95(1) Employment Rights Act 1996, an employee is considered to have been dismissed in circumstances where "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*". This is commonly known as constructive dismissal.

101. In order for there to have been a constructive dismissal there must have been:-

101.1. a repudiatory or fundamental breach of the contract of employment by the employer;

101.2. a termination of the contract by the employee because of that breach; and

101.3. the employee must not of affirmed the contract after the breach, for example by delaying their resignation.

102. In ***Western Excavating (ECC) Ltd v Sharp*** **[1978] ICR 221, CA**, it was said "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed*".

103. An employee can rely on breach of an express or implied term of the contract of employment. In cases of alleged breach of the implied term of trust and confidence the test is set out in the case of ***Malik v Bank of Credit and Commerce International Ltd*** **[1998] AC 20**; namely, has the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test of whether there has been such a breach is an objective one (see ***Leeds Dental Team Ltd v Rose*** **[2014] IRLR 8**).

104. It is open to an employee to rely on a series of events which individually do not amount to a repudiation of contract, but when taken cumulatively are considered repudiatory. In these sorts of cases the "last straw" in this sequence of events must add something, however minor, to the sequence (***London Borough of Waltham Forest v Omilaju*** **[2005] ICR 481**).

105. On the question of waiving the breach, the ***Western Excavating*** case makes clear that the employee "*must make up his mind soon after the conduct of which he complains; if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will regarded as having elected to affirm the contract*".

<u>Unfair dismissal</u>

106. It is for the employer to show the reason for the dismissal and other such reason falls within one of the potentially fair reason is within section 98(2) Employment Rights Act 1996 ("ERA"). Where such reason has been established, then under section 98(4) ERA the determination of whether the dismissal is fair or unfair depends on whether in all the circumstances, (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity in the substantial merits of the case.

<u>Unauthorised deduction from wages</u>

107. An employee has a right under section 13 ERA not to have unauthorised deductions made from his wages. A deduction is where the total amount of wages paid on any occasion by the employer's less than the total amount of wages properly payable by him to the worker on that occasion.

108. A claim must be for "wages" as defined by section 27 ERA and this does not included damages for loss of a chance ***Lucy v British Airways*** **UKEAT/0033/08**.

Breach of contract - notice

109. Under section 86 ERA, in the absence of any contractual notice, an employee is entitled to three week's notice if his period of continuous employment is three years.

Annual leave

110. Regulations 13 and 13A of the Working Time Regulations 1998 ("WTR") give the worker in entitlement to a total of 28 days paid leave per year. Under regulation 14 WTR the worker is entitled to compensation for leave accrued but untaken in the final leave year. A worker is entitled to be paid in respect of annual leave at the rate of a week's pay under regulation 16 WTR.

Conclusions

Constructive unfair dismissal

111. An element of the ***Malik*** test which is sometimes overlooked by parties is that the conduct which is said to be calculated or likely to destroy or seriously damage trust and confidence must be "*without reasonable and proper cause*".

112. When assessing whether this test is satisfied I take a broad view of the relevant circumstances. In particular I take account of the following features in this case: –

112.1. The three men were the respondent's only three employees.

112.2. There was not an inequality of bargaining power, which is very often a feature of employment relationships. All three men were intelligent, experienced and capable businessman well able to look after their own interests. In particular, the claimant took legal advice on protecting his interests with the shareholder agreement and was steadfast in negotiating his position.

112.3. The three men had overlapping relationships of employment, shareholding and co-directorship. Their co-directorship was circumscribed by companies legislation and their shareholding was governed by written agreement. The mechanism that the claimant was most focused on as protecting his interests was the shareholder agreement until his resignation.

112.4. None of the men had a written contract of employment. This is not to say that no contract existed, and the presence of overlapping

relationships certainly does not extinguish or diminish the existence of a contract of employment for the claimant, and the implication of the term of mutual trust and confidence. The overlapping relationships are, however, a part of the background against which I conduct the ***Malik*** test.

112.5. The claimant and Mr Gledhill in particular have pursued business opportunities together and alone in a variety of manners, including consultancy arrangements and joint ventures. The strong impression I gained was that the relationship of employment at the respondent company was a small element of how, certainly the claimant and Mr Gledhill, would have seen themselves as entrepreneurial businessman.

112.6. The CMS "endeavour" (i.e. the operation of a systematic trading strategy fund) started out as a proposal while the claimant was consulting for Heronden. Before the incorporation of the respondent company, protracted negotiations took place with GAM which could have resulted in a sale, merger or joint-venture. The setting up of the respondent company, and the subsequent creation of relationships of employment by the company became a regulatory necessity.

112.7. From January 2018 the respondent had no offices, the claimant was not getting paid and he was carrying out very little work for the respondent. The usual indicia of employment would not have been readily evident to the outside observer. Again, that is not to say that the employment relationship did not exist, nor contained the usual implied terms, but it is part of the background against which I conduct *the* ***Malik*** test.

113. Bearing in mind those features, I turn to the issues to consider: - did the respondent "without reasonable and proper cause, not give [the claimant] an ongoing role, divert business and exclude him from decision-making?".

114. From mid-2017 onwards, perhaps even before the fund had launched, it was clear that the respondent was encountering significant financial difficulties. It had "burnt through" most of Mr Laredo's £1 million investment by 29 September when the fund launched, and only had one $20 million investment in it which had been secured largely as a result of Mr Gledhill's contact.

115. At this point, if there were to be no further investment into the fund, something would have to be done to ensure the business continued or the respondent would go into liquidation and the fund would close. It was certainly reasonable and proper for Mr Gledhill to seek rescue options. The question is: - was it reasonable and proper for him to do so in the manner in which he did, and was that conduct such as to destroy or seriously damage the mutual relationship of trust and confidence?

116. The claimant's role was a marketing one, that is to say introducing investors to the fund. For whatever reason, he introduced no investors to the fund and marketing was therefore never going to be perceived as an attractive aspect of the respondent business to anybody involved in a future deal. The claimant had previously, understandably, sought to protect his position in negotiations with GAM, and in drafting the MoU relating to the

respondent company. This had led to protracted and difficult negotiations with the claimant.

117. The likelihood was, therefore, that if the claimant was informed about seeking rescue packages he would be focused on trying to protect his rather unattractive (to potential rescuers) position. This would have seriously restricted and hampered any attempt to safeguard the business. The claimant would not be entirely without protection, however. If a viable rescue package was to be put in place then he would have to be told pursuant to the shareholder agreement and could vote on any proposal (although given his percentage of shareholding he would likely be outvoted). He could also look to the terms of the shareholder agreement to safeguard his financial position.

118. In the circumstances I find that it was reasonable and proper for Mr Gledhill to explore numerous business proposals he did in order to attempt to safeguard the position of the respondent and the fund and not to involve the claimant in those exploratory conversations. Because these sorts of explorations have such a "low hit rate" I find that it was reasonable and proper of Mr Gledhill not to consider involving the claimant until there was, more or less, a done deal. This is especially the case as it was common ground between the parties that in investment "*everything is uncertain until you invest*" (claimant's oral evidence).

119. This uncertainty is illustrated in the dealings with Prosperise. Mr Pucci discussed proposals from Mr Gledhill in meetings and by email but then pulled out in October 2018. He came back into the picture on 12 February 2019 and indicated on 27 February 2019 that the deal could go ahead. The claimant was told of this within a matter of days on or before 6 March 2019.

120. Catalina was not a rescue package such, but an existing investor investing further sums and changing the structure of the fund in a way that would impact the claimant's role. The evidence shows that Mr Gledhill tried to resist Catalina's proposals to restructure the fund in a way that made it impossible to market to external investors, but his resistance was rather futile in the face of a dominant investor. News of the change in strategy came out in a way that discomfited Mr Gledhill and forced him to discuss it with the claimant, but I have found he did discuss it with the claimant at a reasonably early opportunity after the board meeting of 14 November 2018.

121. Standing back and looking at the picture as a whole it is clear that Mr Gledhill and Mr Vickers did not involve the claimant in business dealings which he had a substantial interest. It is also clear that they took a conscious decision not to involve him in such dealings until he had no opportunity to influence them. It is understandable that, from the claimant's perspective, this looks unfair. Subjectively, his trust and confidence probably was destroyed or seriously damaged by this. However, the ***Malik*** test is an objective one and contains the element of reasonable or proper cause.

122. Without Prosperise and the additional investment of Catalina the respondent would not have survived. It was reasonable and proper for Mr Gledhill and Mr Vickers to believe that involving the claimant in any of the rescue discussions, including Prosperise, would have jeopardised them and condemned the respondent to insolvency. The claimant was told of the Catalina change in strategy very shortly after it was proposed (albeit that

circumstance hastened this). I bear in mind the factors I set out at paragraph 111 above in finding that the respondent had reasonable and proper cause in conducting itself in the manner it did in pursuing both of these proposals.

123. Accordingly I find that the respondent was not in repudiatory breach of the claimant's contract of employment, and that he was therefore not constructively dismissed. Given this finding I do not have to go on to consider further factors such as whether the claimant waived the breach, and whether the dismissal was unfair, as I have found there was not a dismissal in law, but a resignation. I dismiss this claim.

Breach of contract - notice

124. As the claimant resigned and was not dismissed he is not entitled to be paid notice pay. This claim is dismissed

Unauthorised deductions from wages

125. As acknowledged in the claimant's resignation letter, there was a mutual agreement to suspend the claimant's right to monthly remuneration from the respondent with "*an expectation that the payment of remuneration will be resumed once financial circumstances permitted*". I find that there was no express agreement that salaries would resume once financial circumstances permitted, though potentially I can see scope for implying such a term. But even in such term were implied there had been no substantial recovery of the respondent's fortunes by the time of his resignation.

126. I find, therefore, that no wages were "properly payable" to the claimant and consequently that there were no deductions and this claim is dismissed.

Holiday pay

127. The claimant did not give evidence that there was accrued but untaken annual leave in the final year of his employment. Ms Stroud, in her closing submissions, asserts that the claimant accepted in cross examination that he had actually taken holiday, but this is not something I have been able to find in my notes. However, it is for the claimant to prove his case and he has not given any evidence of accrued but untaken holiday. In any event, even if I were to find in his favour he would be entitled to be compensated at the rate of a week's pay under regulation 16 WTR. In the final year of his employment, by mutual agreement he was not being paid and his compensation would be at this rate. In the circumstances this claim is dismissed.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was [V – video, conducted using Cloud Video Platform (CVP)]. It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

Employment Judge **Heath**

Date 6 July 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 06/07/2021.

FOR EMPLOYMENT TRIBUNALS